COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of MCI WorldCom, Inc. Against New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts	)	D.T.E. 97-116
Complaint of Global NAPs, Inc. Against New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts	)	D.T.E. 99-39

VERIZON MASSACHUSETTS

MOTION TO RE-OPEN DOCKETS

Verizon New England Inc. d/b/a Verizon Massachusetts ("Verizon MA") respectfully requests that, to avoid any uncertainty associated with the Federal District Court's consideration of the recommended decision of the Magistrate Judge in *Global NAPs, Inc. v. New England Telephone & Telegraph Co.*, Nos. 2000CV10407RCL, *et al.* (D. Mass.), the Department should re-open these dockets now for the limited purpose of taking comments on whether the language contained in particular agreements provides for reciprocal compensation for Internet-bound traffic. This re-opening will allow the Department to address the Magistrate Judge's concern that the Department has not already interpreted the actual language of the interconnection agreements between Verizon MA and MCI WorldCom, Inc. ("WorldCom") and Global NAPs, Inc. ("GNAPs"), and thus produce much-needed finality and certainty in this dispute, which began in 1997.

In its first order in D.T.E. 97-116, the Department held that the agreement term "local traffic" in the WorldCom agreement encompassed Internet-bound traffic, and that Internet-bound traffic was thus subject to reciprocal compensation under Verizon MA's agreement with WorldCom. *See* D.T.E. 97-116 (1998). In that order, the Department based its analysis of the term "local traffic" in the agreement on FCC precedent and federal court decisions, which it believed at the time classified Internet-bound traffic as "local." *Id.* at 12. The Department noted, however, that the "FCC may make a determination in proceedings pending before it that could require us to modify our findings in this Order." *Id.* at 5 n.11. When the FCC's *1999 Internet Traffic Order*[1] established that the Department's understanding of federal law was incorrect, the Department vacated its own order in D.T.E. 97-116 and held that the language of the agreements did *not* subject Internet-bound traffic to reciprocal compensation. *See* D.T.E. 97-116-C (1999). Subsequent Department orders have confirmed that reciprocal compensation is not required under either Verizon MA's agreement with WorldCom or its agreement with GNAPs.[2]

As the Department knows, GNAPs and WorldCom have sought review of the Department's orders in the United States District Court for the District of Massachusetts (Nos. 2000CV10407-RCL and 2000CV11513-RCL). On July 5, 2002, the Magistrate

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1 *See* Declaratory Ruling, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689, 3695-96, ¶ 10 (1999).

2 *See* D.T.E. 97-116-D (2000) (denying reconsideration of D.T.E. 97-116-C and dismissing GNAPs' complaint in D.T.E. 99-39); D.T.E. 97-116-E (2000) (denying motion to vacate D.T.E. 97-116-C and D.T.E. 97-116-D and to reinstate D.T.E. 97-116); D.T.E. 97-116-F (2001) (denying requests to vacate D.T.E. 97-116-C, D.T.E. 97-116-D, and D.T.E. 97-116-E).

Judge to whom the district judge referred the case proposed in her non-binding recommendation that the district judge find "that the DTE violated federal law by issuing orders in which it refused to consider whether, pursuant to Massachusetts law and other equitable and legal principles, the parties contracted in their interconnection agreements for reciprocal compensation for calls bound for ISPs." Magistrate Judge's Findings and Recommendations at 27 ("F&R") (copy attached).

Both the Department and Verizon MA have filed exceptions to the Magistrate Judge's recommendation arguing that the Department has in fact already interpreted the agreements.[3] Nevertheless, because the Magistrate Judge has raised a question as to this issue, Verizon MA respectfully submits that it would be appropriate for the Department to issue a supplemental order clarifying the issue now in order to protect against uncertainty and to bring resolution to the issue without the need for further District Court proceedings.

To ensure that all parties have a fair opportunity to be heard on the issue, Verizon MA requests that the Department issue an order giving all parties 15 days to submit supplemental comments as to the proper interpretation of the agreements; reply filings could be due 10 days later. Those filings will allow the Department promptly to address

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[3] *See, e.g.*, D.T.E. 97-116-D at 18 (explaining that it looked to whether "[Internet]-bound calls were 'local' *within the meaning of that term as used in interconnection agreements*") (emphasis added); D.T.E. 97-116-E at 13 (explaining that Internet-bound traffic "is not subject to reciprocal compensation *pursuant to the … interconnection agreements*" at issue here) (emphasis added); DTE Summ J. Br. at 35 (Docket Entry 44) ("The Department has never disputed [the] premise" that "the eligibility of [Internet]-bound traffic for reciprocal compensation is an issue controlled by the terms of the parties' interconnection agreement."); DTE Supp. Br. at 1 (Docket Entry 109) (DTE interpretations were "pursuant to the terms of the Interconnection Agreement[s]"); *see also Global NAPs Inc.'s Adoption of the Terms of the Interconnection Agreement Between Global NAPs, Inc. and Verizon Rhode Island Pursuant to the Bell Atlantic/GTE Merger Conditions*, DTE 02-21, at 14 (rel. June 24, 2002) ("As we have done in our D.T.E. 97-116 series of orders, we begin with the language of the interconnection agreement at issue.").

the concerns raised by GNAPs and WorldCom, as well as the Magistrate Judge, without further delay and uncertainty.

The Department's reopening of the dockets to address this issue is not precluded by the Federal District Court's current review of the Department's prior orders. *See American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 541 (1970) (holding that agency's reconsideration of order under judicial review was proper, for the "power of the Commission to reconsider a prior decision does not necessarily collide with the judicial power of review"); *United States v. Benmar Transp. & Leasing Corp.*, 444 U.S. 4, 5 (1979) (agency's "broad powers to 'reverse, change, or modify' its decisions 'are plainly adequate to add to the findings or firm them up as the Commission deems desirable, absent any collision or interference with the District Court'") (quoting *American Farm Lines*, 397 U.S. at 541).

To the extent there might be any uncertainty on that issue, however, the Department could reasonably request that the District Court stay its review proceedings while it responds to the Magistrate Judge's F&R and likely moots the need for the Court to address the objections to that F&R. *See Public Service Co. of Indiana v. ICC*, 749 F.2d 753, 760 (D.C. Cir. 1984) ("In this case, as in *American Farm Lines*, there can be no argument that the ICC's second decision . . . interfered with this Court's jurisdiction. It is significant that we took cognizance of the ICC's decision to reopen, and deferred our review accordingly."); *cf. Southwestern Bell Tel. v. FCC*, 10 F.3d 892, 896 (D.C. Cir. 1993) (granting voluntary remand after petitioner's opening brief was filed, in order "to permit the FCC to give further consideration to the matters addressed in the

Commission's orders, including the ultimate resolution of this case") (internal quotation marks omitted).

Prompt action by the Department is particularly warranted here given the uncertainty that has been introduced by the Magistrates ruling and the length of time this controversy has lasted.

WHEREFORE, Verizon MA requests that the Department grant this motion and re-open the dockets for the limited purpose of taking comments on whether the language contained in the WorldCom and GNAPs agreements provides for reciprocal compensation for Internet-bound traffic.

Respectfully submitted,
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